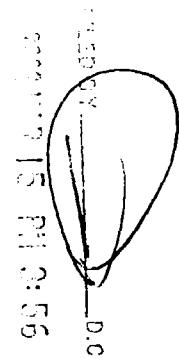


**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

DUNKIN' DONUTS INCORPORATED, )  
a Delaware Corporation, and )  
DUNKIN' DONUTS USA, INC., )  
a Michigan Corporation, )  
Plaintiffs, ) C.A. No. 01-0392-CIV-  
v. ) GOLD/SIMONTON  
MARY'S DONUTS, INC., )  
a Florida Corporation, )  
JUAN F. GUTIERREZ, )  
EUSTAQUIO R. FERNANDEZ, )  
and GIRALDA MALAGON, )  
Defendants. )

**PLAINTIFF'S EMERGENCY MOTION TO COMPEL COMPLIANCE  
WITH SUBPOENA AND MEMORANDUM IN SUPPORT**

Once again, Plaintiff Dunkin' Donuts, Inc. and Dunkin' Donuts, USA, Inc., ("Dunkin'") has served routine discovery in this case and now finds itself before this Court with a motion to compel. On February 13, 2002, Dunkin' served a subpoena and deposition notice on Jack C. Miller, Defendants' accountant, for a deposition initially scheduled for March 15, 2002. Miller, now represented by Defendants' counsel, asserted two days ago on March 13, 2002 that he would not appear at the deposition unless he was paid \$150 per hour for his time. There is no basis for this claim, and Dunkin' moves this Court for an Order compelling Miller to attend his deposition, now tentatively rescheduled for March 22, 2002, without the need for Dunkin' to pay \$150 per hour for his time. Also, Miller objects to bringing any documents with him to the deposition, despite a subpoena requiring him to do so. Dunkin' is entitled to see Miller's



103  
P

C.A. No. 01-0392-CIV-  
GOLD/SIMONTON

accounting documents for the Defendants from year 2001 and up to the present, as well as all of Miller's original documents. Thus, Dunkin' moves for an Order compelling Miller to comply with the subpoena and to bring his accounting documents to the deposition.

## BACKGROUND

Pursuant to Rule 45(c), in an effort to avoid any undue burden on Mr. Miller, Dunkin' subpoenaed Miller on or about February 13, 2002 and noticed his deposition for March 15, 2002 *at Miller's own office*, at 1849 North University Drive, Coral Springs, Florida 33071. (See Ex.

1.) Pursuant to Dunkin's subpoena, Miller was required to make available his original accounting records for use at the deposition. Thus, compliance with the subpoena would be easy; Mr. Miller could simply arrive at his office for the deposition, and the documents would already be there. On February 14, 2002, Miller, through Defendants' counsel, objected to the subpoena as (1) inconsistent with Rule 34(b), (2) cumulative and duplicative with a July 30, 2002 subpoena *duces tecum* previously served on Mr. Miller, and (3) overbroad and burdensome in that Miller claimed he would be unreasonably required to determine which documents were responsive. (See Ex. 2.)

Miller also objected to the location of the deposition at his office; he asserted that he had injured his foot and could not drive. One would think that Miller's asserted incapacity would make his own office the best place for the deposition. Although asserting that he cannot be deposed at his own office, Miller refuses to bring any documents with him to any other location, and he has explicitly refused to travel to Miami to Dunkin's local counsel's office. Rather, he claims that he will only be deposed in Coral Springs at a location *other than* his own office. Nevertheless, Dunkin' is willing to pay for a conference room at the Coral Springs Trade Center in order to take Miller's deposition.

C.A. No. 01-0392-CIV-  
GOLD/SIMONTON

On March 13, 2002, two days before the scheduled deposition, counsel asserted on Mr. Miller's behalf that he would need to be paid \$150 per hour or "no deposition will take place on Friday." (See Ex. 3.) Again on March 14, 2002 Miller through counsel explicitly stated that he would not appear for a deposition without an agreement that Dunkin' pay him in advance. (See Ex. 4.) But Dunkin' need not pay Miller an hourly rate for his deposition, and Dunkin' is entitled to have Mr. Miller bring his documents with him.

### **ARGUMENT**

Dunkin' is not required to pay Miller for his time at his deposition. Mr. Miller is not an expert witness, and he has been tendered the statutory \$40.00 attendance fee, per 28 U.S.C., section 1821(b).<sup>1</sup> Dunkin' will also pay Miller whatever mileage he incurs in accordance with 28 U.S.C., section 1821(c)(2). Such mileage cost will be nominal at best because the deposition is now scheduled at the Coral Springs Trade Center, which is very near Miller's office. Dunkin' has no obligation to pay Miller beyond these statutory reimbursements.

Mr. Miller has asserted that he will suffer an undue burden, and will lose \$1500 per day due to the deposition. Certainly being deposed may be an inconvenience, but alleged lost earnings do not fall within the scope of what constitutes an undue burden under Fed. R. Civ. 45(c). In *Irons v. Karceski*, 74 F.3d 1262, 1264 (D.C. Cir. 1995), the Court of Appeals for the District of Columbia Circuit rejected an attorney/deponent's motion to quash a subpoena based on the subpoena issuer's refusal to pay him the earnings he would lose from his law practice while at the deposition. In that case, the deposition was expected to last three days. The D.C. Circuit held that loss of earnings for that time period did not constitute undue burden under Rule

---

<sup>1</sup> A check made out to Jack Miller for \$40.00 was sent by overnight delivery on March 14, 2002 to Miller's counsel.

C.A. No. 01-0392-CIV-  
GOLD/SIMONTON

45(c), and they affirmed the magistrate's ruling that the \$40.00 per day fee was all the witness was entitled to.

The same result occurred in *Mangla v. The University of Rochester*, 168 F.R.D. 137, 139 (W.D.N.Y. 1996). There, a non-expert, treating physician, third-party deponent alleged that he would suffer a financial burden as a result of the earnings lost due to time spent preparing for, traveling to, and during the deposition itself. *Id.* The Court denied the deponent's request for reimbursement of his hourly billing rates. *See also Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 350 (D.Colo. 1995)(same). As these cases make clear, Mr. Miller cannot force Dunkin' to pay his hourly rate in this matter.

Nor can Miller avoid bringing documents to the deposition. In their first objection against bringing documents to the deposition, counsel claim that the subpoena "fails to comply with Fed. R. Civ. P. 34(b)." See Ex. 2, Objection Letter, at 1. However, Fed. R. Civ. P. 34(b) governs requests for the production of documents that are served on parties to an action, and not subpoenas served on nonparties. Thus, the citation to that rule is inapposite and would not excuse noncompliance with the subpoena.

Miller also argues that the subpoena is "unreasonably cumulative and duplicative of" the earlier July 30, 2002 subpoena *duces tecum*. In or about October, 2002, Miller did produce records responsive to a July 30, 2001 subpoena *duces tecum*. (See Ex. 5.)<sup>2</sup> But the February 13, 2002 deposition subpoena is not duplicative in that there are surely documents generated or reviewed by Mr. Miller since his production of documents last Fall. To date, Dunkin' has received a very incomplete set of documents for the year 2001 as part of Miller's earlier production of documents. The accounting records for 2001 are critical documents in this case

---

<sup>2</sup> The Court also ordered that such documents be produced on November 1, 2002.

C.A. No. 01-0392-CIV-  
GOLD/SIMONTON

given the large deposits of cash into the Defendants' accounts in that year. Obviously Miller cannot assert a claim of duplicative production when these documents have never been produced before.

Moreover, any duplication between the February 13, 2002 deposition subpoena and the July 30, 2001 subpoena *duces tecum* is designed to save time for both parties at Mr. Miller's deposition. Mr. Miller will benefit by bringing the requested original documents to the deposition since he will be more easily able to locate information from his own originals, with which he is already familiar, than if he uses the copies produced to Dunkin', which may not be in the same order as the original material.

Miller's counsel also objects that the subpoena is "overbroad and burdensome." Ex. 2, Objection Letter, at 1. This objection is not based on an alleged undue burden of time and cost, and Miller has provided no evidentiary support for such a claim. *See, e.g., Northrop Corp. v. McDonnell Douglas Corp.*, 751 F. 2d 395, 401 (D.C. Cir. 1984) (holding that a search of 967 cubic feet of documents, taking hundreds of worker hours, was not oppressive enough to warrant quashing a subpoena); *see also Landry v. Airline Pilots Ass'n*, 901 F.2d 404, 435-436 (5th Cir. 1990) (successful objection based on cost of depositions); *Kostelecky v. NL Acme Tool/NL Indus., Inc.*, 837 F.2d 828, 832-33 (8th Cir. 1988) (same). Rather, the objection alleges that one of the several document requests contained in the February 13, 2002 subpoena is vague, "as it requires [Mr. Miller] to determine what documents or other information may or may not relate to the subject matter of the particular request for discovery."

But this objection is completely inconsistent with Mr. Miller's assertion that he already produced documents responsive to the identically worded subpoena *duces tecum* dated July 30, 2002. Miller does not explain why the same request in the February 13, 2002 deposition

C.A. No. 01-0392-CIV-  
GOLD/SIMONTON

subpoena is now vague when he was able to produce documents responsive to the same request in October, 2001. *Compare* Ex. 1, February 13, 2002 Deposition Subpoena at Attachment A thereto with Ex. 5, July 30, 2001 Subpoena *Duces Tecum* at Attachment A thereto. Moreover, the portion of the February 13, 2002 subpoena which is allegedly vague is only that portion which seeks documents dated since 1994 which "relate in any way" to the Defendants. The remainder of the subpoena seeks specific categories of documents to which Mr. Miller's vagueness objection is inapplicable.

In any event, Dunkin' should be allowed to examine the full universe of Defendants' books and records during its deposition of Mr. Miller, and Mr. Miller should be prepared to rely upon those documents when giving testimony. Dunkin' is also entitled to inspect Mr. Miller's originals to ensure that they are identical to the copies produced to Dunkin'.

## CONCLUSION

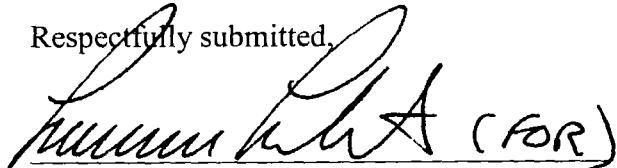
For the foregoing reasons, Dunkin' respectfully requests this Court enter an Order compelling Jack Miller to comply fully with the subpoena served upon him on or about February 13, 2002, and to appear for his deposition, currently scheduled for March 22, 2002, with responsive documents, and without the need for Dunkin' to pay him beyond the statutorily required reimbursements.

C.A. No. 01-0392-CIV-  
GOLD/SIMONTON

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy was hand delivered to the following this 15<sup>th</sup> day  
of March, 2002 to: Robert F. Salkowski, Esq., Zarco, Einhorn & Salkowski, Counsel for third-,  
party deponent Jack C. Miller, Counsel for Defendant Mary's Donuts, Inc. et al., 100 S. E.  
Second Street, Bank of America Tower Suite 2700, Miami, FL 33131.

Respectfully submitted,



Robert L. Zisk  
David L. Smith  
Gregory Zini  
SCHMELTZER, APTAKER & SHEPARD, P.C.  
2600 Virginia Avenue, N.W.  
Suite 1000  
Washington, D.C. 20037  
(202) 333-8800  
Fax: (202) 625-3311

William Davis (191680)  
Lawrence B. Lambert (0032565)  
BUCHANAN INGERSOLL, P.C.  
100 S.E. Second Street, Suite 2100  
Miami, Florida 33131  
(305) 347-4080

Attorneys for Plaintiffs  
Dunkin' Donuts Incorporated and  
Dunkin' Donuts USA, Inc.

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

DUNKIN' DONUTS INCORPORATED,  
a Delaware Corporation, and )  
DUNKIN' DONUTS USA, INC., )  
a Michigan Corporation, )  
Plaintiffs, ) C.A. No. 01-0392-CIV-  
v. ) GOLD/SIMONTON  
MARY'S DONUTS, INC., )  
a Florida Corporation, )  
JUAN F. GUTIERREZ, )  
EUSTAQUIO R. FERNANDEZ, )  
and GIRALDA MALAGON, )  
Defendants. )

## **CERTIFICATE OF CONFERENCE**

Pursuant to Local Rule 26.1(I), the undersigned counsel for Plaintiff Dunkin' Donuts Incorporated, hereby certifies that a good faith attempt was made to resolve the issues presented by Dunkin's Emergency Motion to Compel Compliance with Subpoena via teleconferences with Robert Salkowski counsel for Jack C. Miller and Defendants, on March 12, 13, 14 and 15 2002, and as also evidenced by the e-mail attachments appended to the memorandum in support of the motion. The issue as to the location of the deposition has been resolved, as it will occur in Coral Springs, Florida. The issues relating to the production of documents and the payment of an hourly fee could not be resolved.

Raist Smith

Dated: March 15, 2002

# United States District Court

SOUTHERN DISTRICT OF FLORIDA, Miami Division

Dunkin' Donuts Inc., et al.,

Plaintiffs,

v.

Mary's Donuts, Inc., et al.,

Defendants.

## SUBPOENA IN A CIVIL CASE

CASE NUMBER: 01-0392-CIV-GOLD

Jack C. Miller, CPA, PA  
 TO: 1849 North University Drive  
 Coral Springs, FL 33071

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case pursuant to Federal Rule 30(b)(6)\*

PLACE OF DEPOSITION	DATE AND TIME
1849 North University Drive Coral Springs, FL 33071	March 15, 2002/9:00 a.m.

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

See Attachment A

PLACE	DATE AND TIME
1849 North University Drive Coral Springs, FL 33071	March 15, 2002/9:00 a.m.

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

\* Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6). See Attachment B

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Plaintiffs Dunkin' Donuts Inc., et al.	February 13, 2002

ASSURING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

David L. Smith, SCHMELTZER, APTAKER & SHEPARD, P.C., 2600 Virginia Ave., N.W., Suite 1000, Washington, D.C. 20037 (202) 333-8800

**EXHIBIT #1**

## PROOF OF SERVICE

SERVED	DATE	PLACE
	February 13, 2002	1849 North University Drive Coral Springs, FL 33071
SERVED ON (PRINT NAME)	MANNER OF SERVICE	
Jack C. Miller, CPA, PA	Certified Mail, Return Receipt Requested	
SERVED BY (PRINT NAME)	TITLE	
Jose M. Garcia	Legal Assistant	

## DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on February 13, 2002  
DATE

SIGNATURE OF SERVER

## ADDRESS OF SERVER

2600 Virginia Ave., N.W., Ste. 1000  
Washington, D.C. 20037

## Rule 45, Federal Rules of Civil Procedure, Parts C &amp; D:

## (c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

- (i) fails to allow reasonable time for compliance;
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in per-

son, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

## (B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

## (d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

ATTACHMENT A

1. For January 1, 1994 through the present, produce all files, documents, records, correspondence, and computer printouts, including but not limited to all bookkeeping and accounting records, tax returns, financial statements, worksheets, payroll records, ledgers, journals, check registers, invoices, canceled checks, and any other records or documents in your possession that relate to **Mary's Donuts, Inc.** (employer identification # 65-0401207); d/b/a **Dunkin' Donuts** at 30125 S. Dixie Highway in Miami, Florida 33033, 413 S.E. 1st Avenue in Florida City, Florida 33034, and Building 920, Homestead Air Force Base in Homestead, Florida 33039; and/or **Juan F. Gutierrez** (social security no.: 264-92-1071); and/or **Eustaquio R. Fernandez** (social security no.: 589-17-4069); and/or **Giralda Malagon** (social security no.: 153-56-0259) ("Subject Parties"), whether individually or jointly.

2. For January 1, 1994 through the present, produce all files, documents, records, correspondence, and computer printouts, including but not limited to all tax returns, financial statements, bank statements, real estate documents, and any other records or documents in your possession that relate to any businesses, in which any of the Subject Parties have or had an interest, whether individually or jointly.

3. For January 1, 1994 through the present, produce any and all other documents in your possession that relate in any way to the Subject Parties, whether individually or jointly.

*Dunkin' Donuts Incorporated v. Mary's Donuts, Inc.*

**ATTACHMENT B – ACCOUNTANCY FIRM JACK MILLER CPA**

The corporate representative of the accountancy firm Jack Miller CPA with the most knowledge as to the following topic:

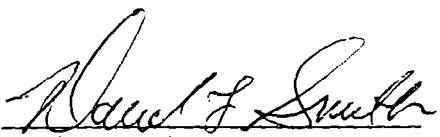
- (1) Accounting and bookkeeping services performed for Mary's Donuts, Inc., Bethel Land, Inc., Coral Dental Center, Inc., Juan Gutierrez, Giralda Malagon, and/or Eustaqiuo Fernandez for the period of 1994 through the present, including the interpretation of any and all accountants workpapers, general ledgers, and other documents created or drafted as part of such services.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing subpoena to Jack C. Miller, CPA was served by Federal Express on this 13th day of February 2002 on the following:

Himanshu M. Patel, Esq.  
Zarco & Pardo  
Bank of America Tower  
100 Southeast 2nd Street, Ste. 2700  
Miami, FL 33131

Attorney for the Defendants



\_\_\_\_\_  
David L. Smith

# United States District Court

SOUTHERN DISTRICT OF FLORIDA, Miami Division

Dunkin' Donuts Inc., et al.,

Plaintiffs,

v.

Mary's Donuts, Inc., et al.,

Defendants.

## SUBPOENA IN A CIVIL CASE

CASE NUMBER: 01-0392-CIV-GOLD

Jack C. Miller, CPA

TO: 1849 North University Drive  
Coral Springs, FL 33071

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
1849 North University Drive Coral Springs, FL 33071	March 15, 2002/9:00 a.m.

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

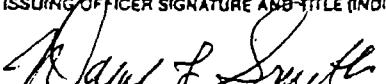
See Attachment A

PLACE	DATE AND TIME
1849 North University Drive Coral Springs, FL 33071	March 15, 2002/9:00 a.m.

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
 Attorney for Plaintiffs Dunkin' Donuts Inc., et al.	February 13, 2002

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER	EXHIBIT "1"
David L. Smith, SCHMELTZER, APTAKER & SHEPARD, P.C., 2600 Virginia Ave., N.W., Suite 1000, Washington, D.C. 20037 (202) 333-8800	

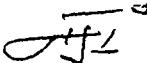
PROOF OF SERVICE		
SERVED	DATE	PLACE
	February 13, 2002	1849 North University Drive Coral Springs, FL 33071
SERVED ON (PRINT NAME)		MANNER OF SERVICE
Jack C. Miller, CPA		Certified Mail, Return Receipt Requested
SERVED BY (PRINT NAME)		TITLE
Jose M. Garcia		Legal Assistant

## DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on February 13, 2002

DATE

  
SIGNATURE OF SERVER

## ADDRESS OF SERVER

2600 Virginia Ave., N.W., Ste. 1000  
Washington, D.C. 20037

## Rule 45, Federal Rules of Civil Procedure, Parts C &amp; D:

## (c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

son, except that, subject to the provisions of clause (c)(3)(B)(ii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held,

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

## (B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

## (d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in per-

ATTACHMENT A

1. For January 1, 1994 through the present, produce all files, documents, records, correspondence, and computer printouts, including but not limited to all bookkeeping and accounting records, tax returns, financial statements, worksheets, payroll records, ledgers, journals, check registers, invoices, canceled checks, and any other records or documents in your possession that relate to **Mary's Donuts, Inc.** (employer identification # 65-0401207); d/b/a **Dunkin' Donuts** at 30125 S. Dixie Highway in Miami, Florida 33033, 413 S.E. 1st Avenue in Florida City, Florida 33034, and Building 920, Homestead Air Force Base in Homestead, Florida 33039; and/or **Juan F. Gutierrez** (social security no.: 264-92-1071); and/or **Eustaquio R. Fernandez** (social security no.: 589-17-4069); and/or **Giralda Malagon** (social security no.: 153-56-0259) ("Subject Parties"), whether individually or jointly.

2. For January 1, 1994 through the present, produce all files, documents, records, correspondence, and computer printouts, including but not limited to all tax returns, financial statements, bank statements, real estate documents, and any other records or documents in your possession that relate to any businesses, in which any of the Subject Parties have or had an interest, whether individually or jointly.

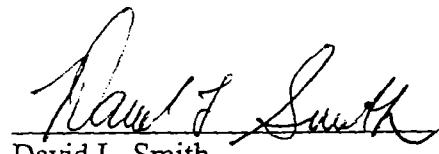
3. For January 1, 1994 through the present, produce any and all other documents in your possession that relate in any way to the Subject Parties, whether individually or jointly.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing subpoena to Jack C. Miller, CPA, PA was served by Federal Express on this 13th day of February 2002 on the following:

Himanshu M. Patel, Esq.  
Zarco & Pardo  
Bank of America Tower  
100 Southeast 2nd Street, Ste. 2700  
Miami, FL 33131

Attorney for the Defendants



\_\_\_\_\_  
David L. Smith

**ZARCO & PARDO**

PROFESSIONAL ASSOCIATION

ATTORNEYS AT LAW

BANK OF AMERICA TOWER

100 SOUTHEAST 2ND STREET

SUITE 2700

MIAMI, FLORIDA 33131

**MIAMI**

TELEPHONE (305) 374-5418

TELEFAX (305) 374-5428

**LOS ANGELES**

TELEPHONE (213) 627-2449

TELEFAX (213) 627-2419

E-MAIL [zarcopardo@zarcopardo.com](mailto:zarcopardo@zarcopardo.com)

INTERNET [www.zarcopardo.com](http://www.zarcopardo.com)

ALEJANDRO BRITO  
JUDE C. COOPER  
ROBERT M. EINHORN  
ELISSA H. GAINSBURG  
DANIEL P. GALFOND  
STEVAN J. PARDO  
HIMANSHU M. PATEL  
ROBERT F. SALKOWSKI  
ROBERT ZARCO

February 14, 2002

David L. Smith, Esq.  
Schmeltzer, Aptaker & Shepard, P.C.  
2600 Virginia Avenue, N.W., Suite 1000  
Washington, D.C. 20037-1905

*Re: Dunkin' Donuts, Inc. v. Mary's Donuts, et al.*  
*Case No. 01-0392*

Dear David:

Please be advised that this law firm represents Jack C. Miller, CPA, P.A. and Jack C. Miller, individually (collectively, "Mr. Miller"), regarding the deposition notices served on each of them in the above captioned matter. Please direct all future communications directly to undersigned counsel regarding this matter.

Please be advised that Mr. Miller objects to the Notice of Deposition to the extent that it suggests that the deposition shall continue from day to day. In accordance with Fed. R. Civ. P. 30 (d)(1), Mr. Miller shall be produced in his corporate capacity for one deposition limited to seven (7) hours. Additionally, we will need to arrange for another location outside Mr. Miller's office yet within Coral Springs, Florida, in which to take Mr. Miller's deposition. Mr. Miller has injured his foot, and is thus not able to drive at this time. I would suggest that we use the Coral Springs Trade Center.

Separately, Mr. Miller objects to the subpoena duces tecum which requires him to produce certain categories of documents at his deposition. The subpoena duces tecum fails to comply with Fed. R. Civ. P. 34(b). More importantly, the subpoena duces tecum is unreasonably cumulative and duplicative of the documents sought in the subpoena duce tecum dated July 30, 2001, that was served on Mr. Miller. Mr. Miller also objects to the subpoena duces tecum that requests he produce all documents since 1994 that "relate in any way" to any of the Defendants. This request is overbroad and burdensome on Mr. Miller, as it requires him to determine what documents or other information may or may not relate to the subject matter of the particular request for discovery.

**EXHIBIT "Q"**

David L. Smith, Esq.

February 14, 2002

Page 2

Please contact me should you wish to discuss this matter. Otherwise, I will await to hear from you regarding the new location of Mr. Miller's deposition.

Sincerely,



ROBERT F. SALKOWSKI

cc: R. Zarco, Esq.  
H. Patel, Esq.  
Mary's Donuts, Inc.  
Jack Miller, CPA, P.A. (By fax)  
L. Lambert, Esq.

David L. Smith

---

**From:** Robert F. Salkowski [rsalkowski@zarcopardo.com]  
**Sent:** Wednesday, March 13, 2002 2:30 PM  
**To:** David L. Smith  
**Subject:** Jack Miller Depo/Mary's Donuts

David: The subpoena served on Jack Miller is invalid. Therefore, any appearance by Mr. Miller would be purely voluntary. With this understanding, several issues must be resolved: First, Mr. Miller is requiring that he be paid for his lost time in appearing at this deposition. His hourly rate is \$150 per hour. Please confirm in writing that DDI will pay this hourly rate to Mr. Miller. Second, Mr. Miller will not travel to Miami from Coral Springs. As stated today, Mr. Miller cannot drive an automobile at this time because his foot is broken. Therefore, if this deposition goes forward, the deposition must be conducted in Coral Springs, Florida. I left a voice mail message to discuss this matter with you. Until these issues are resolved, no deposition will take place on Friday.

Robert F. Salkowski, Esq.  
ZARCO Einhorn & Salkowski, P.A.  
100 S.E. 2nd Street, Suite 2700  
Miami, FL 33131  
Telephone: (305)374-5418  
Fax: (305)374-5428

**David L. Smith**

---

**From:** Robert F. Salkowski [rsalkowski@zarcopardo.com]  
**Sent:** Thursday, March 14, 2002 3:46 PM  
**To:** David L. Smith  
**Subject:** RE: Jack Miller's deposition

Jack Miller will not attend the deposition unless paid the value of his lost time.

-----Original Message-----

From: David L. Smith [mailto:DLS@saslaw.com]  
Sent: Thursday, March 14, 2002 1:32 PM  
To: Robert F. Salkowski  
Subject: RE: Jack Miller's deposition

I will reserve a room at Coral Springs for 9:00 am on March 22. I am forwarding today by Fed Ex a check for \$40.00 travel fee to Jack Miller c/o you. Re: the hourly payment of \$150 I am reviewing that now; so far I have seen nothing that requires us to pay any hourly rate; if you have authority on this point please tell me what it is.

-----Original Message-----

From: Robert F. Salkowski [mailto:rsalkowski@zarcopardo.com]  
Sent: Thursday, March 14, 2002 11:11 AM  
To: David L. Smith  
Subject: RE: Jack Miller's deposition

David: Jack Miller has indicated that he would be available next Friday, March 22, 2002. Again, however, Mr. Miller confirmed that he will not attend the deposition unless and until DDI agrees in writing to pay for his loss of time, i.e., his hourly rates. Mr. Miller is not on a salary, and is in the middle of his busiest season. Mr. Miller stands to lose at least \$1500.00 because of this deposition. Accordingly, he must be paid.

-----Original Message-----

From: David L. Smith [mailto:DLS@saslaw.com]  
Sent: Thursday, March 14, 2002 10:24 AM  
To: Robert F. Salkowski  
Subject: Jack Miller's deposition

Robert; Please confirm a date next week for Miller's deposition. As I told you, I will do it at the Coral Springs Trade Center any day next week. I really need to know asap to reserve a room there. Let me know today. Thanks. Dave

**PRIVILEGED AND CONFIDENTIAL**

This e-mail contains confidential, privileged information intended only for the addressee. Do not read, copy or disseminate it unless you are the addressee. If you have received this e-mail in error, please call us immediately at 202-333-8800 and ask to speak to the message sender. Also, please e-mail the message back to the sender at saslaw.com by replying to it and then deleting it. In such circumstances, you are advised that you may not review, disclose, copy, distribute, or take any other action in connection with the information transmitted. We appreciate your assistance in correcting this error.

# United States District Court

Southern District, Miami Division DISTRICT OF Florida

Dunkin' Donuts Inc., et al.,

Plaintiffs,

v.

Mary's Donuts, Inc., et al.,

Defendants.

## SUBPOENA IN A CIVIL CASE

CASE NUMBER: 01-0392-CIV-GOLD

Jack C. Miller, CPA, PA

TO: 13402 SW 128 Street

Miami, FL 33186

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

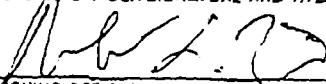
See Attachment A

PLACE	DATE AND TIME
Mail to: Springer Alexander of Schmeltzer, Aptaker & Shepard, P.C. 2600 Virginia Ave., N.W., Ste. 1000, Washington, D.C. 20037	August 13, 2001 / 9:00 a.m.

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
	July 30, 2001
Attorney for Plaintiffs	
Dunkin' Donuts Inc., et al.	

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER  
 Robert L. Zisk, SCHMELTZER, APTAKER & SHEPARD, P.C., 2600 Virginia Ave., N.W.,  
 Suite 1000, Washington, D.C. 20037 (202) 333-8800

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

**EXHIBIT "5"**

## PROOF OF SERVICE

SERVED	DATE	PLACE
	July 30, 2001	13402 SW 128 Street Miami, FL 33186
SERVED ON (PRINT NAME)	MANNER OF SERVICE	
Jack C. Miller, CPA, PA	Certified Mail, Return Receipt Requested	
SERVED BY (PRINT NAME)	TITLE	
N. Springer Alexander	Paralegal	

## DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on July 30, 2001  
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER  
2600 Virginia Ave., N.W., Ste. 1000  
Washington, D.C. 20037

## Rule 45, Federal Rules of Civil Procedure, Parts C &amp; D:

## (c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

- (i) fails to allow reasonable time for compliance;
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in per-

son, except that, subject to the provisions of clause (c)(3)(D)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

## (d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

ATTACHMENT A

1. For January 1, 1994 through the present, produce all files, documents, records, correspondence, and computer printouts, including but not limited to all bookkeeping and accounting records, tax returns, financial statements, worksheets, payroll records, ledgers, journals, check registers, invoices, canceled checks, and any other records or documents in your possession that relate to **Mary's Donuts, Inc.** (employer identification # 65-0401207); d/b/a **Dunkin' Donuts** at 30125 S. Dixie Highway in Miami, Florida 33033, 413 S.E. 1st Avenue in Florida City, Florida 33034, and Building 920, Homestead Air Force Base in Homestead, Florida 33039; and/or **Juan F. Gutierrez** (social security no.: 264-92-1071); and/or **Eustaquio R. Fernandez** (social security no.: 589-17-4069); and/or **Giralda Malagon** (social security no.: 153-56-0259) ("Subject Parties"), whether individually or jointly.

2. For January 1, 1994 through the present, produce all files, documents, records, correspondence, and computer printouts, including but not limited to all tax returns, financial statements, bank statements, real estate documents, and any other records or documents in your possession that relate to any businesses, in which any of the Subject Parties have or had an interest, whether individually or jointly.

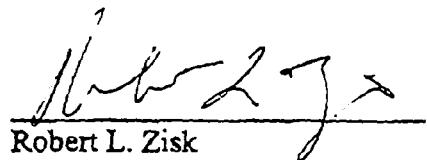
3. For January 1, 1994 through the present, produce any and all other documents in your possession that relate in any way to the Subject Parties, whether individually or jointly.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing subpoena to Jack C. Miller, CPA, PA, was served by first-class mail, postage prepaid, on this 30th day of July 2001 on the following:

Himanshu M. Patel, Esq.  
Zarco & Pardo  
Bank of America Tower  
100 Southeast 2nd Street, Ste. 2700  
Miami, FL 33131

Attorney for the Defendants



\_\_\_\_\_  
Robert L. Zisk